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Cause No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

ALAN LOUIS CHAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

January 3, 2007

Alan Louis Chavis, (Pro Se)
Federal Register #26139-080
F.C.I. SEA. P.O. Box 9000
Seagoville, Texas 75159-9000
Telephone No. Not Available

QUESTIONS PRESENTED

1) Whether the district court committed reversible error in denying Petitioner's Sixth Amendment right to "counsel of choice", when the trial court, over Petitioner's objections, allowed Petitioner's hired, paid and preferred co-counsel of choice to withdraw and replaced preferred co-counsel with court-appointed "stand by" counsel, which was a substantially lesser degree of representation than Petitioner desired and requested?

2) Whether the district court committed reversible error and violated Petitioner's right to a fair trial, refusing Petitioner the defense of his choice by denying a "good faith" instruction, and in any event, whether the appellate decision conflicts with it's own prior precedent; United States v. Hopkins, 744 F.2d 716 (10th Cir. 1984) (en banc), with regard to good faith instruction?

PARTIES TO THE PROCEEDINGS

Petitioner is Alan Louis Chavis, pro se, Federal Register No. 26139-080, a prisoner in custody at the Federal Correctional Institution, 2113 North Hwy. 175, Seagoville, Texas 75159-9000.

Respondent is the United States of America, represented by the Office of the Solicitor General of the United States, Department of Justice, 950 Pennsylvania Avenue N.W, Room 5614, Washington, D.C. 20530-0001.

All parties to the proceedings are listed in the caption of this petition, there are no other interested parties; Supreme Court Rule 14.1(b).

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JURISDICTION

The date on which the United States Tenth Circuit Court of Appeals decided my case was August 29, 2006.

A timely petition for rehearing, en banc, was filed on September 12, 2006, a copy of the Order, dated October 4, 2006, denying rehearing appears at APPENDIX "B" to the petition.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (1); Supreme Court Rule 14.1(e).

OPINIONS BELOW

The opinion of the United States Tenth Circuit Court of Appeals in United States v. Chavis, C.A. No. 05-6001, August 29, 2006, appears at APPENDIX "A" to the petition, and is Reported at 461 F.3d 1201 (10th Cir. 2006); Supreme Court Rule 14.1(d).

CONSTITUTIONAL PROVISIONS INVOLVED

Issue 1: Right to Counsel of Choice

The denial of counsel of choice violates the Sixth Amendment of the United States Federal Constitution, which provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense;" U.S.C.A. Sixth Amendment.

Issue 2: Right to Fair Trial

The denial of a right to fair trial violates: 1) the Sixth Amendment above; and 2) the Due Process Clause of the Fifth Amendment. Federal Courts interpret the Due Process Clause of the Fourteenth Amendment to be equally inherent in the Fifth Amendment with respect to Federal Constitutional Rights. The Fourteenth Amendment, Section 1, provides that:

"All persons born or naturalized on the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws"; U.S.C.A. Fourteenth Amendment.

Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

A. Summary of the Charges

A criminal complaint was filed against Petitioner in the United States Western District of Oklahoma Court on December 11, 2003. Petitioner was arrested, held without bail, and subsequently indicted on January 20, 2004; United States v. Chavis, CR-04-009-M. A superseding indictment was filed on February 18, 2004.

A superseding information was filed on March 26, 2004, and a second superseding indictment was filed on August 3, 2004 charging Petitioner with conspiracy to commit an offense or to defraud the United States, in violation of 18 U.S.C. § 371; and with multiple counts of mail fraud; aiding and abetting, in violation of 18 U.S.C. §§ 1341 and 2.

B. Summary of The Case

On December 24, 2003, the Court appointed Ms. June Tyhurst, Assistant Federal Public Defender, to represent Petitioner. On December 31, 2003, Petitioner filed a waiver of counsel and announced his desire to proceed pro se. On January 6, 2004, Petitioner renewed his request to proceed pro se, which the Court granted and excused Attorney Tyhurst from further representing Petitioner.

On January 28, 2004, the government filed a Motion For Hearing To Determine Pro Se Representation. On February 5, 2004, the Court held a hearing concerning the pro se representation and again appointed Attorney Tyhurst, but this time the appointment was in the capacity of "co-counsel." On February 10, 2004, the Court held a "follow-up hearing" on the previous representation hearing, and changed the capacity of Attorney Tyhurst's representation from co-counsel to stand-by counsel.

Petitioner desired co-counsel, not stand by counsel. Petitioner, therefore hired his own co-counsel; on June 16, 2004, Attorney Gary L. Cantrell entered his appearance as Petitioner's co-counsel, and Attorney Tyhurst filed a Motion To Withdraw as Petitioner's attorney. On June 17, 2004, the Court granted Attorney Tyhurst's Motion To Withdraw.

On July 13, 2004, Attorney Cantrell, after being paid six thousand dollars, $6,000.00, filed a motion to withdraw as Petitioner's co-counsel; he was dissatisfied because he wanted an extension of time to review discovery materials. Petitioner insisted on pursuit of his speedy trial rights as an intricate part of his trial strategy and, therefore, refused to consent to a defendant's motion for extension of time. On July 19, 2004, without

Petitioner's consent, Attorney Cantrell filed a motion to continue hearing on Motion To Withdraw as co-counsel.

On July 20, 2004, the Court granted Attorney Cantrell's motion to continue, and set a hearing date on August 2, 2004, at which time the Court granted the government's oral motion to continue from the August to the September docket. The Court ultimately granted the extension, which was the stated reason for Attorney Cantrell's Motion To Withdraw, and then allowed Cantrell to withdraw anyway.

The Court, again, appointed Attorney Tyhurst in the capacity of "stand-by" counsel, which is a lesser degree of representation than Petitioner desired, and to which Petitioner stringently objected; APPENDIX "C" to the petition. Because Petitioner's pre-trial detention facility provided absolutely no access to a law library, co-counsel was essential and stand-by counsel was grossly inadequate. A trial by jury was held on September 13 through 17, 2004. The jury found Petitioner guilty of counts 1 through 12. Sentencing was held on December 10, 2004, Petitioner was sentenced to a term of imprisonment of 292 months; 60 months as to count 1, and 232 months as to counts 2 through 12, with all terms to run concurrently with each other.

Judgment of the District Court was entered on December 16, 2004. A timely notice of appeal was filed on December 22, 2004. Petitioner hired Attorney Bill Zuhdi to perfect an appeal; Attorney Zuhdi filed entry of appearance on December 31, 2004 and Attorney Tyhurst filed a Motion To Withdraw on January 3, 2005, which was granted on January 4, 2005.

An appeal was filed with the United States Tenth Circuit Court of Appeals on December 21, 2005. On August 29, 2006, the Court of Appeals affirmed the decision of the District Court. Petitioner filed a timely petition for rehearing on September 12, 2006, which was denied on October 4, 2006.

C. Summary Of The Facts

Petitioner founded and operated "Louis Allen and Company," a legitimate business that recruited home workers who earned, as promised, the weekly incomes guaranteed and were additionally paid, as promised, weekly bonus checks, $225 hiring bonuses, etc. Petitioner genuinely believed his operation was lawful and that he was helping workers make an honest living.

The business operated for approximately 2 ½ years and grew to over 700 home workers, not victims, who were receiving regular weekly checks from the company, as

attested by P.I. Caver in his affidavit to obtain the criminal complaint on December 11,2003; "[t]here were over 700 active home workers who were receiving regular weekly checks from the company."

Evidence of multiple factors including; 1) regular weekly earnings of home workers; 2) weekly bonus checks paid to home workers; 3) training program established for home workers; 4) testimonial letters from active home workers; 5) the fact that requested reimbursements were paid to workers; and 6) the fact that an unconditional money back guarantee existed and was available to all employees, contributed to Petitioner's genuine good faith belief that he was operating in a lawful manner, all of which was evidenced at trial; APPENDIX "D" to the petition.

The fact that regular weekly payments were made to workers was evidenced in the testimony of P.I. Caver in the Criminal Complaint, December 2003, and in APPENDIX "D" to the petition. The company and Petitioner, possessed numerous (between 200 and 300) testimonial letters written by satisfied home workers praising the business and expressing satisfaction.

The Postal Inspectors confiscated the testimonial letters, which were exculpatory evidence that belonged to

Petitioner, and all but 12 were never returned to Petitioner for use in his defense. When asked to return the remaining exculpatory evidence, they claimed the 12 letters were all they had; APPENDIX "D" to the petition.

All active home workers who successfully completed the requisite training program and followed the company's directions earned weekly bonus checks in addition to the promised per stuffed envelope amount; APPENDIX "D" to the petition. Further, as evidenced by the record above, an unconditional money back guarantee was available to all home workers and all requested refunds were made.

Weekly bonus checks were issued, $225 hiring bonuses were regularly mailed out to home workers; APPENDIX "D" to the petition. Every promise made to every worker was honored and all requested reimbursements were made. Petitioner established an active "Hotline Help line" for the assistance and information of all home workers, consisting of those who were still in training and those who were already working. Petitioner provided whatever assistance and encouragement they required; APPENDIX "D" to the petition. Unlimited free postage stamps were provided to home workers, as

needed and requested; APPENDIX "D" to the petition.

The text of the letter that Petitioner sent to every supervisor at which time they were hired or promoted, provided instructions, interaction t resolve all disputes in favor of the worker; see Trial Transcript, p. 210-211, APPENDIX "D" to the petition.

This letter to all supervisors was followed-up by a phone call to make sure they understood the company's policy and agreed to the instructions contained therein; APPENDIX "D" to the petition. All of the above hardly leads one to the conclusion that the home worker employees were "victims," but rather that Petitioner went to great lengths to ensure their satisfaction, proper training, and continued employment. The referenced trial transcripts pinpoint evidence that Petitioner acted in good faith.

In April 2003, despite the fact that this case was only in the investigative stage, ten postal inspectors broke into Petitioner's Akron Alabama offices and confiscated everything, including office furniture. No charges had been filed, yet they also went to the banks where the business kept the gross receipts and actually confiscated the money in those accounts. They did not freeze the accounts pending the outcome of the investigation, but rather

actually took the money leaving approximately $50,000.00 in refund, bonus and reimbursement checks, which had already been sent out to be returned to the banks. The business was still subject to all obligations to the hundreds to active home workers and to payment of all checks already sent out, but had literally been looted by the inspectors.

Petitioner was arrested in December 2003, and HELD WITHOUT BAIL. All money was confiscated from his personal accounts while Petitioner was being held in pre-trial detention. Petitioner had two choices; accept an overworked public defender, or defend himself. Petitioner believed that once a jury saw the truth and he was acting in good faith and genuinely believed all his business operations were lawful, the jury would surely acquit. Petitioner was originally assigned a public defender, but the public defender was much too busy with other case assignments to dedicate the kind of time Petitioner's complex mail fraud case would require to defend. Petitioner therefore chose the only remaining option available; self-representation.

Petitioner assisted by friends, scraped together the money to hire the co-counsel of his choice, Attorney Gary

Cantrell, to assist in his defense, but Attorney Cantrell "took the money and ran." The Court allowed him to do so by granting Attorney Cantrell's motion to withdraw, less than thirty days after counsel filed his entry of appearance and was paid $6,000.00.

The Court re-appointed a public defender as his "stand-by counsel" and denied Petitioner his counsel of choice by allowing co-counsel Cantrell to withdraw and take the money. With no remaining finances available, Petitioner was left with a stand-by public defender; forced to mount a defense to a complex mail fraud case without the desired assistance of his counsel and without access to a law library to prepare his defense, in violation of the Sixth Amendment.

D. Summary Of The Issues

Petitioner knowingly and intelligently made a choice to be hisown lead counsel, maintaining control of the manner in which his defense was conducted. "A criminal defendant has a constitutional right to conduct his own defense." Faretta v. California, 45 L Ed 2d 562 (1975). Petitioner had absolutely no intention of throwing his Sixth Amendment rights out the window with this choice, but rather sought the assistance of "co-counsel" of his choice to assist in presenting his defense and theories

to the jury at trial.

"[A]t trial, counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of voir dire, examine and cross examine witnesses effectively (including the accused) object to improper prosecution questions and much more." Patterson v. Illinois, 101 L Ed 2d 261 277 n. 13 (1988); Cf., e.g., 1 Bench Books for United States District Court Judges 1.02-2 – 1.02-5 (3 ed 1986).

Petitioner did not seek an appointed government attorney to take over his complex case of alleged mail fraud because appointed counsel would not likely understand the circumstances surrounding the case or present Petitioner's theory of defense, on the basis of his good faith, to the jury at trial, as completely or as well as Petitioner believed he could do himself. Petitioner sought and paid for the co-counsel of his choice to assist him; APPENDIX "E" to the petition.

Nor did Petitioner knowingly or intelligently consent to the assistance of a court-appointed government lawyer in the capacity or stand by counsel; a lesser degree of assistance than Petitioner required and requested, in light of the circumstances as a whole, where NO LAW LIBRARY was available to Petitioner prior to or during the

trial; APPENDIX "F" to the petition.

Petitioner did seek to maintain control of and conduct his own defense in the capacity of lead counsel while maintaining the professional assistance of the co-counsel of his choice. The government alleged and the appeals court endorsed the position that once Petitioner opted to be his own lead counsel, he waived all the Sixth Amendment rights guaranteed by the Federal Constitution, which is a fundamentally flawed interpretation of the Sixth Amendment.

Moreover, Petitioner further sought to submit to the jury the fact that he was acting in "good faith" and genuinely believed he was operating his business in a lawful manner; his primary theory of defense. The trial judge's refusal to instruct the jury as to the defendant's primary defense theory which was supported by the facts and evidence as set forth above in Section C, Summary of the Facts to the petition deprived the jury of a potential and substantial reason to acquit Petitioner.

E. Standard of Review

On June 26, 2006, this Court held the erroneous

deprivation of a criminal defendant's choice of counsel: 1) violated the defendant's Sixth Amendment right, under the Federal Constitution, to counsel of choice and; 2) is not subject to harmless error analysis,

United States v. Gonzalez-Lopez, 165 L Ed 2d 409 (2006).

"An erroneous deprivation of the right to counsel of choice with consequences that were necessarily unquantifiable and indeterminate qualified as structural error in view of the difficulty of assessing the effect of the error, where, in light of the myriad aspects of representation, harmless error analysis in such a context would e a speculative inquiry into what might have occurred in an alternate universe." Id.

Just as the Court in U.S. v. Gaudin, 515 U.S. 506 (1995) found trial judge's refusal to allow jury to determine a question of materiality constituted reversible error, violating the Fifth Amendment's Due Process Clause and the Sixth Amendment's Right to Jury Trial, the Tenth Circuit in U.S. v. Wolny, 133 F.3d 758 (10th Cir. 1998) found reversible error where the trial judge refused to instruct the jury on the defendant's theory of defense.

"It is reversible error not to instruct the jury on a

theory of the defense that is supported by the evidence and the law." Id. at 765 (citing U.S. v. Scafe, 822 F.2d 928 932 (10th Cir. 1987)).

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE AUTHORITATIVE HOLDINGS OF THIS COURT, WITH PRIOR DECISIONS OF ITS OWN CIRCUIT, AND WITH THE HOLDINGS OF MULTIPLE OTHER CIRCUITS REGARDING THE ISSUES IN THIS CASE.

This Court in Wheat v. U.S., 486 U.S. 153 159 (1988) held that an element of a defendant's right to have the assistance of counsel is the right of a defendant who does not require appointed counsel to choose who will represent him. In Powell v. Alabama, 287 U.S. 45 53 (1932) the Court stated, "it is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."

Petitioner, after having been appointed a government lawyer, chose to maintain a higher level of control over his own defense, requested appointed counsel resign, requested self representation and further hired and

paid for his own co-counsel of choice.

The government alleges an "all or nothing" approach to the Sixth Amendment arguing that Petitioner waived his Sixth Amendment right in their entirety by opting for self-representation. However, Petitioner desired a particular degree of assistance of counsel, which was co-counsel to assist in defense preparation. The appeals court effectively sanctioned the "all or nothing" theory when it affirmed the judgment. The government, and the Tenth Circuit, erroneously contends that a defendant must either accept the government appointed lawyer or forfeit his Sixth Amendment rights in their entirety.

The district court denied Petitioner his counsel of choice, as articulated by this Court in Gonzalez-Lopez (supra) when it allowed Petitioner's paid co-counsel of choice to resign, and substituted a
government appointed stand by counsel, over Petitioner's objections.

In Gonzalez-Lopez, the government contended a Sixth Amendment violation is not "complete" unless the defendant can show that substitute counsel was ineffective within the meaning of Strickland v. Washington, 466 U.S. 668 i.e., that substitute counsel's performance was deficient

and the defendant was prejudiced by it on in the alternative, a reasonable probability that, the result of the proceedings would have been different. Id. at 417.

This Court specifically rejected the government's contention, and the proposed alternative stating, "The right to select counsel of one's own choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trail. It has been regarded as the root meaning of then constitutional guarantee. Where the right to be assisted by counsel of one's own choice it wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.

Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants [as here], regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice, which is the right to a particular lawyer regardless of comparative effectiveness, with the right to effective counsel, which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed."

Gonzalez-Lopez, at 419. (Internal citations omitted).

The Court's analysis fits squarely here, where deprivation of the right is complete when Petitioner was erroneously prevented from being represented by the lawyer he wanted and had paid and was forced to accept the government's lawyer as stand by counsel over Petitioner's objections.

The Gonzalez-Lopez, Court went on to find the error, which is precisely the same error as in the instant case, was not subject to harmless error analysis, but because the errors occurred during presentation of the case to the jury [as here] and their effect could not be quantitatively assessed in the context of other evidence presented in order to determine whether they were "harmless beyond a reasonable doubt," the errors were rather "structural errors" requiring automatic reversal, as defined by the Court in Sullivan v. Louisiana, 508 U.S. 275 (1993).

"An accused has a fundamental right to be represented by counsel of his own choice." Powell v. Alabama, 287 U.S. 45 (1932). "The Sixth Amendment encompasses broad guarantees of four rights: 1)...2)...3)...& 4) The right to be represented by counsel of one's own choice." U.S. v. Padilla-Martinez, 762 F.2d

942 (11th Cir. 1985) (Citing Glasser v. U.S., 315 U.S. 60 70 (1942). "Denial of right of counsel of choice is reversible error, regardless of whether prejudice is shown." Bland v. Calif. D.O.C., 20 F.3d 1469 (9th Cir. 1994).

It has been recognized that an indigent defendant in a criminal trial has a constitutional right to the assistance of appointed counsel. See Gideon v. Wainwright, 9 L Ed 2d 799 (1963). The defendant, however, should not be compelled to accept the assignment of counsel by the government when said counsel not of his choice or even in the capacity of his choice. "[T]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." Faretta, supra at 581.

As Justice Frankfurter eloquently put it for the Court in Adams v. U.S. ex rel. McCann, 87 L Ed 268 (1942), to require the acceptance of counsel "is to imprison a man in his privileges and call if the Constitution." Id. at 280. See also Justice Scalia's concurrence in Martinez v. Court of App. of Cal., 145 L Ed 2d 597 609 (2000), "I have no doubt that the framers of our Constitution would not have found acceptable the compulsory assignment of counsel by the government to plead a criminal defendant's case."

The Tenth Circuit's decision, with regard to the denied jury instruction, conflicts with its own prior decisions. See U.S. v. Wolny, 133 F.3d 758 (10th Cir. 1998) (Finding reversible error in refusal to instruct jury on theory of defense that is supported by the evidence and law.) Petitioner's defense theory was supported by the evidence set forth in the above Section C, Summary of the facts, and supported by the law as set forth in this Section of the petition. See also U.S. v. Scafe, 822 F.2d 928 932 (10th Cir. 1987) (A defendant is entitled to jury instruction on any theory of defense finding support in the evidence and the law.)

The Tenth Circuit's decision, with regard to the denied jury instruction, conflicts with the decisions of other U.S. Circuit Courts of Appeal. See U.S. v. Barnett, 197 F.3d 138 (5th Cir. 1999) (It is reversible error to refuse a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to support a verdict of not guilty.) If Petitioner's good faith defense theory, which clearly had an evidentiary foundation as set forth above, and been believed by the jury it would have been legally

sufficient to support a verdict of not guilty in the instant case.

See also U.S. v. Ansaldi, 372 F.3d 118 (6th Cir. 2004) (A criminal defendant is entitled to a jury instruction on any defense for which there is a foundation in the evidence.) Cf. U.S. v. Ford, 184 F.3d 566 (6th Cir. 1999) (A court should refuse a jury instruction if no evidence supports it, but even weak evidence will suffice.)

See also U.S. v. Smith, 223 F.3d 554 (7th 223 F.3d 554 (7th Cir. 2000) (Reversal is proper where the jury instructions inaccurately state the law or fail to present a theory of defense supported by the evidence.) Cf. U.S. v. Douglas, 818 F.2d 1317 1321 (7th Cir. 1987) (We hold that a defendant is entitled to an instruction on his or her theory of defense if; the defendant proposes a correct statement of law; the defendant's theory is supported by the evidence; the defendant's theory of defense is not part of the charge; and the failure to include an instruction on the defendant's theory of defense in the jury charge would deny the defendant a fair trial.)

Cf. U.S. v. Walker, 720 F.2d 1527 1541 (11th Cir. 1983) (Discussing when failure to instruct constitutes

reversible error.) Clearly, the Tenth Circuit's decision in the case at bar conflicts with this Court's authoritative holdings above, with the prior decisions of its own circuit, and with decisions of other circuit courts of appeal. The Tenth Circuit erred in finding Petitioner's defense theory was not supported by the evidence as set forth in Section C, Summary of Facts to the petition.

II THE ISSUES ARE STARKLY PRESENTED BY THE PRESENT CASE.

The district court held multiple hearings and considered multiple motions related to Petitioner's appointed of counsel, request for self representation, appointment of co-counsel, change in the capacity of Petitioner's appointed counsel from co-counsel to stand by counsel, appearance of hired and preferred co-counsel, withdrawal of co-counsel and reappointment of stand by counsel.

The record clearly reflects Petitioner's objections to his hired counsel being allowed to withdraw and a stand by government lawyer's subsequent reappointment. Petitioner's appeal brief discussed this issue thoroughly in both the opening brief and in the petition for en banc rehearing. Issue 1 is, therefore, starkly presented in this

case.

Petitioner timely requested a good faith jury instruction. The evidence and controlling case law supported giving the good faith jury instruction. The trial court committed reversible error in refusing to give a good faith defense instruction thereby denying Petitioner a fair trial and keeping from the jury a substantial reason to acquit Petitioner.

This issue was properly objected to at trial, evidence of which is supported by the record. This issue was presented to the appeals court in the form of a supplemental issue/brief and included in the petition for en banc rehearing. Issue 2 is, therefore, starkly presented in this case.

III THE QUESTIONS AND ISSUES PRESENTED ARE RECURRING ISSUES OF SUBSTANTIAL NATIONAL IMPORTANCE.

Both questions presented in this petition are at issue and recur daily in district courts across the nation. Virtually all jury trials involve the Sixth Amendment right to counsel, the right to a fair trial and a defendant's entitlement to a jury instruction

on his theory of defense, where the theory is supported by the evidence. Federal questions related to the Sixth

Amendment, as here, are clearly of substantial importance because the Sixth Amendment is fundamental to ALL judicial proceedings in the United States affecting all defendants who go to trial in all districts and in all appellate circuits across the land.

IV. THE DECISION OF THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS IS INCORRECT IN THIS CASE.

The three judge panel that issued the opinion in the case at bar was: TACHA, HOLLOWAY and HARTZ, Circuit Judges, the opinion was written by HARTZ, Circuit Judge. The panel fatally misconstrued Petitioner's contentions in multiple parts of the opinion and is therefore incorrect.

Right to Counsel of Choice

The panel's opinion APPENDIX "A" set forth that Petitioner did argue his right to co-counsel. The panel misconstrued and misstated appellate counsel's concession during oral arguments finding: "at oral argument, however, Mr. Chavis's attorney conceded that Mr. Chavis had no such right." Id. at p 7.

The panel then cited cases about "hybrid representation" finding no Sixth Amendment right to

hybrid representation. Id. The error is that Petitioner or appellate counsel never argued a right to hybrid representation. Appellate counsel's concession was that he did not. The issue of Petitioner's right to co-counsel of his choice was the accurate contention and no concession thereby occurred. The misconstruance of Petitioner's contention and the erroneous opinion deriving thereof, was discussed at length in the denied petition for en banc rehearing.

The opinion further and erroneously states "Apparently what Mr. Chavis is suggesting is that (1) Mr. Cantrell had exceeded the limits of co-counsel's permissible exercise of authority in the case, so that Mr. Chavis had in essence relinquished his pro se representation; (2) the withdrawal of Mr. Cantrell therefore left Mr. Chavis without counsel; and (3) the Court thus violated Mr. Chavis's right to counsel by allowing Mr. Cantrell to withdraw. This is an interesting argument in theory, but the first premise lacks factual support." (emphasis added) Id. at p 8.

Of course the first premise lacks factual support because, factually, this is an inaccurate construance of Petitioner's first premise. By misconstruing the contention, which is actually and factually the deprivation of

Petitioner's right to co-counsel of his choice, the panel naturally found the inaccurate premise lacked factual support. It is unknown where the panel came up with the imaginary "Cantrell exceeded his limits" premise because it certainly was not before the Court.

Apparently what the panel is suggesting is that once a defendant chooses to invoke his well recognized right to self representation, he (1) should no longer be afforded the protections of the Sixth Amendment; (2) has no further say in choosing a particular hired lawyer to assist in his defense; (3) has no say in the capacity of assistance he requires, i.e. co-counsel, stand by counsel, etc. and (4) must accept any government lawyer the Court chooses to appoint and in any capacity. The panel's decision is incorrect and in conflict with the holdings of this Court.

Good Faith Instruction

Circuit precedent on the issue of entitlement to a good faith instruction dictates that a defendant is not guilty of mail fraud if he "in good faith believed that the plan would succeed, that the promises made would be kept and the representations carried out." U.S. v. Hopkins, 744 F.2d 716 718 (10th Cir. 1984) (en banc). At trial, Petitioner requested, but was denied, a good faith instruction; APPENDIX "G" to the petition.

Petitioner's good faith defense was supported by voluminous testimony from multiple witnesses; APPENDIX "D" to the petition.

Where a defense theory is supported by the law and by some evidence, as here a defendant is entitled to a good faith instruction in the Tenth Circuit. The trial court erred in finding the evidence did not support the requested good faith instruction. The Tenth Circuit erred in affirming the judgment,the opinion is incorrect and reversible error occurred.

I certify under the penalty of perjury that the statements contained herein are true and correct to the best of my knowledge and belief. Executed on this 3rd day of January, 2007.

CONCLUSION / PRAYER

FOR THESE REASONS, Petitioner prays this Honorable Court will grant discretionary review of the petition for writ of certiorari. May it be so Ordered.

Respectfully,

Alan Louis Chavis (Pro Se)
Federal Register #26139-080
F.C.I. SEA. P.O. Box 9000
Seagoville, Texas 75159-9000

Supreme Court, U.S.
FILED

Cause No. 061200 JAN 3 - 2007

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ALAN LOUIS CHAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES TENTH CIRCUIT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

January 3, 2007

Alan Louis Chavis, (Pro Se)
Federal Register #26139-080
F.C.I. SEA. P.O. Box 9000
Seagoville, Texas 75159-9000
Telephone No. Not Available

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APPENDIX "A"

OPINION OF THE TENTH CIRCUIT; U.S. v. Chavis, 05-6001

Reported at 461 F.3d 1201 (19th Cir. 2006)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ALLAN LOUIS CHAVIS, a/k/a Louis Allen, a/k/a John Lawrence, Defendant - Appellant.	No. 05-6001 Filed: August 29, 2006

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. NO. CR-04-09-01-M)

Bill Zuhdi, Oklahoma City, Oklahoma, for Defendant - Appellant.

James F. Robinson, Assistant United States Attorney, (John C. Richter, United States Attorney, on the brief), Oklahoma City, Oklahoma, for Plaintiff - Appellee.

Before **TACH**, **HOLLOWAY**, and **HARTZ**, Circuit Judges

HARTZ, Circuit Judge.

Alan Louis Chavis appeals his convictions in the United States District Court for the Western District of Oklahoma on 11 counts of mail fraud, *see* 18 U.S.C. § 1341, and one count of conspiracy to commit mail fraud, *see id.* § 371. He contends that (1) the district court denied him his right to counsel, 920 there was insufficient evidence to sustain his convictions, (3) the district court erroneously refused to give a good-faith instruction to the jury, and (4) the district court erroneously sentenced him under the mandatory Sentencing Guidelines scheme. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

Mr. Chavis, using the aliases Louis Allen and John Lawrence, conducted an envelope-stuffing scheme that operated like chain mail. Under the scheme, newspaper advertisements promised employment at home and directed those interested to call a phone number. Those who called ("responders") listened to a recording that asked them to leave their names, addresses, and phone numbers.

Responders who provided their addresses were sent an "introductory" packet, which included a letter from a purported (but nonexistent) company officer or employee, whose photograph was on the letter. There were several versions of the letter. All described the work being offered as stuffing envelopes at home. he letters differed in the announced rate of pay, which ranged from

$1.40 to $2.76 for each envelope stuffed. Some of the letters said that the work originated from mail-order companies who needed workers but did not want to pay for the resulting labor costs. "If they hired more employees," those letters explained, "they would have to supervise the, rent more office space, pay more taxes, health insurance, liability insurance, workers' compensation, and all of this involves more paperwork.: Aplee. Supp. App. At 60, 75, 76. By using home workers these companies could pay up to $2.76 per envelope stuffed "and still save money." *Id.* Other versions of the letter stated that workers were needed as part of a company expansion into new markets "and we have literally hundreds of thousands of new customers who need to receive our circulars." *Id.* At 81, 96. Several versions stated that preaddressed, prestamped envelopes and prefolded circulars would be delivered to the responder's home to be stuffed. All versions of the letter directed responders to mail a registration fee of $25, which would later be doubly or triply refunded.

Those who sent the $25 fee received an acceptance letter notifying them that they had been accepted to stuff envelopes and instructing them to send a self-addressed stamped envelope and $1 for each of five different training shipments. The training materials told the responders to obtain a post office box and voice mail and to place advertisements similar to the ones they had answered. The ads were to include the phone number of a voice

voice mail box, on which the participant was to record a two-minute script. When those who followed these directions ("participants") began receiving responses in their voice mail boxes, they were to send a packet of introductory materials similar to the ones they had received, requesting a $25 registration fee. When the fee was paid, they were to keep half for themselves and to forward the remaining $12.50 to the processing center. Participants made copies of an acceptance letter provided with the training materials and mailed one to each new responder. The letter directed the responder to send money fore training materials. The training materials lamely attempted to describe this process as what had been advertised:

As we told you in the last Training and Orientation Shipment, in order to generate the Customer Response Envelopes you will be processing, **you** will place classified ads in publications anywhere in the United States. When the customers respond, these envelopes (pre-addressed and stamped) are sent directly to you at the mailing address you have selected. You stuff them with your pre-folded, free details circulars/application and seal them. You mail your completed envelopes. Next, the resulting cash remittances are sent directly to you for processing. Again, you will stuff an envelope with a Notice of Acceptance, which tells them that their paperwork has been received and is being processed.

Aplee. Supp. App. At 89 (second and third emphasis added).

A few participants moved up in the operation, acting as processing centers. Jacqueline Earls, at the direction of "Louis

Allen" continued working as a participant but also received the $12.50 checks remitted by other participants, who had kept half of each $25 application fee as their share. Retaining $5 for herself from each check, she deposited the remainder into a bank account from which "Allen" made withdrawals. She testified that she never sent envelopes to be stuffed to any of the applicants but was merely increasing the number of newspaper ads being placed. She eventually pleaded guilty to mail fraud.

Tamara Briscoe performed similar functions and spoke with "Mr. Allen" nearly every day. She ran ads, mailed out different versions of introductory letters describing the work either as stuffing envelopes for mail-order companies or as helping the business expand into new markets, and received applications and money for training materials. She opened one bank account at "Mr. Allen's" direction and forwarded to him an ATM card. She deposited into this account $7.50 of each $12.50 check she received from participants; she kept the remaining $5 for herself. Also, at "Mr. Allen's" direction she opened a second bank account from which she made refunds. She eventually pleaded guilty to mail fraud.

Using the aliases Louis Allen and John Lawrence, Mr. Chavis also hired secretarial services to make bank deposits, to receive his mail, and to prepare documents to be mailed. Sonja Patillo testified that she was hired by such a service to collect the

dollar bills responders sent in for the training materials. She also mailed training materials to responders in the self-addressed stamped envelopes they had provided, answered phone calls from responders, and tried "to appease them in some way" if they were unhappy with the scheme. Aplt. App. Vol. 1 at 706.

Some responders chose not to participate after receiving the training materials and seeing what the "business" entailed. Some requested refunds.

No envelopes or prefolded circulars were ever delivered to participants. The only items ever "stuffed" were the introductory letters, acceptance letters, and training materials that were mailed to responders and new participants, not materials for mail-order companies who needed workers. Participants were simply recruiting others to send in more money in a classic Ponzi or pyramid scheme.

Based on the records seized by postal inspectors from Ms. Briscoe and Ms. Earls, the government created two summary exhibits that calculated the number of applications (and their accompanying $25 checks) they had handled: 17,890 for Ms. Earls and 83, 321 for Ms. Briscoe.

Mr. Chavis was arrested in mid-December 2003. The district court appointed June Tyhurst as his counsel on December 24, 2003, but he filed a waiver of counsel on December 31. After a series of hearings regarding his request to proceed pro se, the

court granted the request on February 12, 2004. Although initially proposing that Ms. Tyhurst be co-counsel, the court appointed her as standby counsel. Several months later, on June 16, 2004, Gary Cantrell entered an appearance as Mr. Chavis's co-counsel and the court permitted Ms. Tyhurst to withdraw. Within a month, however, Mr. Cantrell filed a motion to withdraw as co-counsel; the court granted the request on August 23, 2004, and reappointed Ms. Tyhurst as standby counsel.

At trial the government called 28 witnesses, including Ms. Earls and Ms. Briscoe; six participants who had placed ads, received applications with $25 checks, and forwarded half the proceeds to a processing center; nine responders who declined to anticipate further after sending the $25 registration fee or an additional $5 for training materials; five people who provided secretarial services to Mr. Chavis; and one John Lawrence, whose name and social security number Mr. Chavis had misappropriated as an alias. Mr. Chavis did not testify or call any witnesses. The jury delivered guilty verdicts on all counts. Mr. Chavis did not object to the findings in the presentence report, and the district court sentenced him to concurrent terms of 60 months' imprisonment on the conspiracy count and 292 months' imprisonment on the mail-fraud counts.

II. DISCUSSION

A. Denial of Counsel

Mr. Chavis contends that the district court violated his right to counsel by permitting Mr. Cantrell to withdraw. In his brief on appeal Mr. Chavis argued that he had a right to co-counsel. At oral argument, however, Mr. Chavis's attorney conceded that Mr. Chavis had no such right. *See United States v. McKinley*, 58 F.3d 1475, 1480 (10th Cir. 1995) ("[I]t is certainly true that there is no constitutional right to a hybrid form of representation."); *United States v. Hill,* 526 F.2d 1019, 1025 (10th Cir. 1975) ("The Sixth Amendment does not give any indication that hybrid representation is a right of constitutional dimensions.... [And] no statutory right of hybrid representation is accorded."). Instead, he argued that Mr. Chavis had relinquished his right to proceed pro se and had retained Mr. Cantrell as lead counsel. He cited *McKaskle v. Wiggins*, 465 U.S. 168 (1984), and *McKinley*, 58 F.3d at 1480, for the proposition that a pro se defendant may relinquish his right to self-representation if his standby counsel assumes control of the case. He contended that Mr. Chavis's retained counsel, Mr. Cantrell, did in face assume control of the case and that by allowing Mr. Cantrell to withdraw, the district court denied Mr. Chavis his right to counsel. We disagree.

In *McKaskle* a pro se defendant claimed that standby

counsel had so interfered with his self-representation that he had been deprived of the right to conduct his own defense. *See* 465 U.S. at 173. The Supreme Court rejected the claim on the facts of the case, but recognized that a pro se defendant must have "a fair chance to present his case in his own way," *id.* At 177, and that there are limits that standby counsel must respect, *see id.* At 177-88. As for *McKinley,* the pertinent issue was simply whether the defendant had asked to proceed pro se or merely to participate as co-counsel; we held that he had requested to proceed pro se. *See* 58 F.3d at 1480-81.

Apparently what Mr. Chavis is suggesting is that (1) Mr. Cantrell had exceeded the limits on co-counsel's permissible exercise of authority in the case, so that Mr. Chavis had in essence relinquished his pro se representation; (2) the withdrawal of Mr. Cantrell therefore left Mr. Chavis without counsel; and (3) the court thus violated Mr. Chavis's right to counsel by allowing Mr. Cantrell to withdraw. This is an interesting argument in theory, but the first premise lacks factual support.

The relationship between a pro se defendant and co-counsel was described to Mr. Chavis by the district court early in the proceedings. On December 5, 2004, the following exchange occurred:

THE COURT: The Court - we researched it very quickly - was

trying to look at a circumstance where you would still be representing yourself, but where the counsel could be of more assistance to you, more of a co-counsel, or joint counsel. That person wouldn't be your whipping boy, or girl, but you couldn't say, "Go do this, this, this" and they go do it. That person, you are more in an equal posture as related to the case.

THE DEFENDANT: They would be able to assist me on the rules of evidence and courtroom procedures?

THE COURT: It would be more like a co-counsel situation. You, as the Defendant, would participate certainly as your own counsel and as co-counsel, but you would still have the services of an appointed counsel in more than an advisory role. But it would still be subject to your direct control in matters of strategy and how you wanted to examine witnesses, and other functions.

There is no Constitutional right to this kind of representation, but the Court is trying to create a circumstance which creates the least - which lessens an environment for error in the trial.

Would you be interested in this joint counsel, or co-counsel kind of thing?

THE DEFENDANT: ...I can't imagine why I would turn that down.

Aplt. App. Vol I at 27-28

The bounds of authority for co-counsel were hardly approached, much less exceeded, in this case. During the brief time that Mr. Cantrell was co-counsel, he filed no motions and did not appear in court as Mr. Chavis's representative. In fact, the only documents in the record signed by Mr. Cantrell are his entry of appearance and his request to withdraw. Mr. Chavis clearly requested the right to represent himself, and then retained Mr. Cantrell as his co-counsel, not lead counsel. He was undoubtedly "present[ing] his case in his own way." *McKaskle*, 465 U.S. at 177. He maintained ultimate control of the case, and proceeded pro se throughout. The district court did not violate Mr. Chavis's right to counsel by allowing Mr. Cantrell to withdraw and then appointing Ms. Tyhurst only as standby counsel.

B. Sufficiency of the Evidence

Mr. Chavis argues that the evidence at trial was insufficient to support his convictions for mail fraud and conspiracy to commit mail fraud. Sufficiency of the evidence is a question of law that we review de novo, asking only "whether taking the evidence - both direct and circumstantial, together with the reasonable inferences to be drawn therefrom-in the light most favorable to the government, a reasonable jury could find the defendant[] guilty beyond a reasonable doubt." *United States v.*

Platte, 401 F.3d 1176, 1180 (10th Cir. 2005) (internal quotation marks omitted).

To establish guilt under the mail-fraud statute, 18 U.S.C. § 1341, the government had to prove that (1) Mr. Chavis engaged in a scheme or artifice to defraud or to obtain money by means of false and fraudulent pretenses; (2) he did so with the intent to defraud; and (3) he "used the United States mails... to facilitate that scheme." *United States v. Rahseparian*, 231 F.3d 1267, 1271 (10th Cir 2000). Mr. Chavis argues only that the evidence was not sufficient to establish the second element, the intent to defraud. The argument is frivolous.

Mr. Chavis's "business" promised those who responded to the newspaper ads that they would earn money stuffing envelopes. This was a false promise. The business did not provide participants with either material to be stuffed (except for one form letter that the participants themselves had to copy for their mailings) or envelopes. Although participants put documents in self-addressed envelopes from their own victims, they were not being paid as described in the newspaper ads and acceptance letters. They were not performing the task for companies retaining their stuffing services (either mail-order firms or Mr. Chavis's own operation), and even Mr. Chavis did not argue at trial that he had provided any envelope-stuffing work. The "service" the participants were paid to provide was

not stuffing envelopes but soliciting victims. Their pay was not stuffing envelopes but soliciting victims. Their pay was based on how many victims they recruited to send them money, not on how proficient they were at putting circulars in envelopes.

Witnesses described how Mr. Chavis controlled the entire operation. It was a natural, compelling inference for the jury to find that Mr. Chavis caused the promotional materials to be distributed with no intent to fulfill the promises made. *See Cleveland v. United States*, 531 U.S. 12, 19 (2000) (it is "unmistakable that the [mail-fraud statute] reach[es] false promises and misrepresentations as to the future." (Internal quotation marks omitted)); *United States v.* O'Malley, 535 F.2d 589, 592 (10th Cir. 1976) (entering into agreement to sell with no intention of performing constitutes fraud within meaning of mail-fraud statute). Moreover, as icing on the cake, witnesses testified to Mr. Chavis's various artifices to conceal his identity and involvement in the scheme. Such attempts at concealment can establish fraudulent intent. *See United States v. Welch,* 327 F.3d 1081, 1105 (10th Cir. 2003) ("Intent [to defraud] may be inferred from evidence that the defendant attempted to conceal activity." (internal quotation marks omitted)). The evidence was sufficient for the jury to find beyond a reasonable doubt that Mr. Chavis intentionally defrauded his victims.

As for the conspiracy charge, the government must prove;

"(1) the defendant's agreement with another person to violate the law; (2) his knowledge of the essential objective of the conspiracy; (3) his knowing and voluntary involvement; and (4) interdependence among the alleged co-conspirators." *Rahseparian,* 231 F.3d at 1272. "Stated simply," the charge "required the government to prove [he] had an explicit or implicit agreement with [his co-conspirators] to commit mail fraud." *Id.*

The only possible question regarding this charge is whether any of Mr. Chavis's associates realized that the enterprise was committing fraud; if they did not, they could not have been co-conspirators. *See United States v. Weidner,* 437 F.3d 1023, 1033 (19th Cir. 2006) (to establish guilt under § 371 "the government was required to prove that the two [co-conspirators] agreed to [commit fraud], and to knowingly engage in" the criminal activity). But Ms. Earls and Ms. Briscoe, both of whom pleaded guilty to mail fraud before testifying, described their own involvement in terms that clearly showed their knowledge that they were distributing false promises of envelope-stuffing jobs. Based on this evidence, a reasonable jury could have found beyond a reasonable doubt that Mr. Chavis had an agreement with his co-conspirators to commit mail fraud.

C. Good-Faith Instruction

A defendant is not guilty of mail fraud if he "in good faith

believed that the plan would succeed, that the promises made would be kept and the representations carried out." *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc). At trial Mr. Chavis requested (but apparently did not tender) a good-faith instruction. The district court denied the request, ruling that there was insufficient evidence in the record to support such an instruction. The court cited *United States v. Smith*, 13 F.3d 1421, 1426 (10th Cir. 1994), for the proposition that "a benign explanation of only *some* of the acts is insufficient," and stated that "[a]t best, that's what this Court finds that we have here." Aplt. App. Vol. 4 at 1011 (emphasis added). Mr. Chavis objected to the court's failure to give the instruction, but he neither stated his reasons why the instruction should be given nor gave any grounds for his objection to the court's decision not to give it:

> THE COURT: Mr. Chavis, do you have any objections to the instructions for the record that this Court will give?
>
> MR. CHAVIS: No, I don't, Your Honor.
>
> THE COURT: Very well.
>
> MR. CHAVIS: You noted my objection to the lack of good faith?
>
> THE COURT: Right, I did.

Aplt. App. Vol 4 at 1013

Because Mr. Chavis's objection did not state the grounds on which it was based, we question whether he adequately preserved the issue. *See* Fed. R. Crim. P. 30(d). But we need not resolve that question because there was no error in denying the requested instruction.

This court is bound by its en banc decision that a defendant in a mail-fraud case is entitled to a good-faith instruction if he requests it and "there is sufficient evidence to support the theory." *Hopkins,* 744 F.2d 716 at 717. [1]App "A" 18

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[1]Apparently, we are the only circuit to so hold. The other circuits to address the matter have held, at least as a practical matter that a district court is not required to give a separate good-faith-defense instruction in a fraud case because in finding of the intent to defraud, which is an element of the crime, *see Rahseparian*, 231 F.3d at 1271, necessarily implies that there was no good faith. *See United States v. Dockray,* 943 F.2d 12, 155 (1st Cir. 1991) ("[W]here the court properly instructs the jury on the element of intent to defraud - essentially the opposite of good faith - a separate instruction on good faith is not required."); *United States v. McElroy*, 910 F.2d 1016 (2d Cir. 1990) (instruction to jury on "intent to defraud'...conveyed the essence of a 'good faith defense' instruction"); United States v. Gross, 961 F.2d 1097, 1103 (3d Cir. 1992) ("[A] jury finding that the defendant has acted knowingly and wilfully is inconsistent with a finding that the defendant acted in good faith."); *United States v. Mancuso,* 42 F.3d 836, 847 (4th Cir. 1994) ("If the district court gives adequate instruction on specific intent, a separate instruction on good faith is not necessary."); *United States v. Upton,* 91 F.3d 677, 683 (5th Cir. 1996) (jury instruction on "'knowingly'" and "'willfully' ... substantially covered"

(...continued)

("[A] defendant is not entitled to a specific good faith instruction so long as considering the instructions as a whole, the jury was adequately instructed upon his theory of defense....It is self-evident that one with an intent to defraud does not act in good faith." (internal quotation marks and ellipsis omitted)); *United States v. Rushton*, 963 F2d 272, 274 (9th Cir. 1992) ("[A] defendant is not entitled to a separate good faith instruction when the court adequately instructs on specific intent." (internal quotation marks omitted)); *United States v. Sirang,* 70 F.3d 588, 594 (11th Cir. 1995) ("[A] finding of specific intent to deceive categorically excludes a finding of good faith." (Internal quotation marks omitted)); *United States v. Gambler,* 662 F.2d 834, 837 (D.C. Cir. 1981) (same). The Eighth Circuit has not expressly overruled its statement that a good-faith instruction is required, *see United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985) ("[T]his court has held that defendants are entitled to an instruction on good faith where one has been requested and evidence exists to support the theory."); but is has implicitly done so by holding that the requirement is satisfied by a proper specific-intent instruction, *see United States v. Sanders,* 834 F.2d 717, 719 (8th Cir. 1987) (good-faith instruction not needed if specific intent to defraud is required by the instructions given). Similarly, the Sixth Circuit, relying on the Fifth Circuit decision in *United States v. Goss*, 650 F.2d 1336, 1345 (5th Cir. 1981), has held that failure to give a requested good-faith instruction in a mail-fraud case is error, but the error is harmless when the specific-intent instruction "adequately informed the jury of the defendants' theory of the case, and properly placed the burden of proof of intent on the government." *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir. 1984). (In later cases the Fifth defendant's good-faith defense); *United States v. Mutuc*, 349 F.3d 930, 934 (7th Cir. 2003)Circuit has not spoken in terms of

harmless error, but rather has simply held that a specific-intent instruction satisfactorily informs the jury of the defense. See Upton, 91 F.3d at 683; United States v. Gray, 751 F.2d 733, 735-36 (5th Cir. 1985).)

To justify the instruction, the defendant's evidence "must have the capacity to rebut all evidence of false and misleading conduct, all failures to disclose that which should have been disclosed and all matters that deceive and were intended to deceive another." *Smith,* 13 F.3d at 1426. "A benign explanation of only some of the acts is insufficient," the defendant must "completely rebut evidence that he or she intended to defraud." *Id.* In particular. "[a] defendant's honest belief that a venture will ultimately success does not constitute good faith if, in carrying out the plan, he knowingly uses false representations or pretenses with intent to deceive." *United States v. Janusz*, 135 F.3d 1319, 1323 (10th Cir. 1998).

Mr. Chavis's claim of good faith is predicated on his assertions that he did not think he was committing mail fraud and that he thought he was actually helping participants. But he points to no evidence, nor does he even claim, that he honestly believed that he would fulfill the promise to provide envelope-stuffing jobs. Accordingly, he was not entitled to a good-faith instruction.

D. Sentencing

In *Booker v. United States*, 543 U.S. 220 (2005), the Supreme Court "held that mandatory application of the [Sentencing] Guidelines violates the Sixth Amendment when judge-found facts, other than those of prior convictions, are employed to enhance a sentence." *United States v. Gonzalez-Huerta*, 403 F.3d 727, 731 (10th Cir. 2005) (en banc). Mr. Chavis's trial was conducted in September 2004, before *Booker* but after the Supreme Court's decision in *Blakely v. Washington*, 542 U. S. 296 (2004), had cast doubt on whether a judge, rather than the jury, could find the facts necessary for the enhancements under the Guidelines. Thus, after the jury returned its verdicts, the district court recessed to finalize the jury instructions for fact-finding relating to sentencing. At the end of the recess, Mr. Chavis announced to the court that he was waiving any involvement by the jury in the sentencing proceeding. Also, he did not object to the findings in the presentence report.

On appeal Mr. Chavis argues that the district court nevertheless erred in applying the Guidelines mandatorily. We have used the term "nonconstitutional *Booker* error" to categorize mandatory application of the Guidelines. See *United States v. Paxton*, 422 F. 3d 1203, 1207 (10th Cir. 2005). Mr. Chavis did not raise this argument in district court, so our review is for plain error. See *Gonzalez-Huerta*, 403 F.3d at 732. Again, plain error

is "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (Internal quotation marks omitted).

On this issue the government concedes that the first two prongs of the plain-error test have been met, but argues that Mr. Chavis has not met the third or fourth prongs. We need not address the third prong of the plain-error test because Mr. Chavis cannot satisfy the fourth. *See id.* At 736. We have held that non-constitutional *Booker* error does not satisfy the fourth prong is the sentence falls within Guidelines range and "there is no record evidence to support a lower sentence" *Id.* At 738-39. We see no such record evidence. The district court did not commit plain error in sentencing Mr. Chavis.

III. CONCLUSION

We AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ALLAN LOUIS CHAVIS, a/k/a Louis Allen, a/k/a John Lawrence, Defendant - Appellant.	No. 05-6001 (D.C. No. CR-04-09-01-M)

JUDGMENT

Filed August 29, 2006

Before **TAHCA**, **HOLLOWAY**, and **HARTZ**, Circuit Judges.

This case originated in the Western District of Oklahoma and was argues by counsel.

The judgment of that court is affirmed.

If defendant, Alan Louis Chavis, was released pending appeal, the court orders that, within 30 days of this court's mandate being filed in District Court, the defendant shall surrender to the United States Marshal for the Western District of Oklahoma. The District Court may, however, in its discretion, permit the defendant to surrender directly to a designated Bureau of Prisons institution for service of sentence.

APPENDIX "B"

ORDER DENYING EN BANC REHEARING

Filed October 04, 2006

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ALLAN LOUIS CHAVIS, a/k/a Louis Allen, a/k/a John Lawrence, Defendant - Appellant.	No. 05-6001

ORDER

Filed October 4, 2006

Before **TACHA**, **HOLLOWAY**, and **HARTZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

THE DEFENDANT: Your Honor, I feel like I'm being deprived of my Sixth Amendment right to co-counsel of my choice, your Honor. I have to state that for the record, that it's against my wishes that this man be allowed to withdraw. I've been deprived of a co-counsel and given another stand by counsel, which is of no legal benefit to me.

THE COURT: Do you know why – do you recall why Mr. Cantrell asked to withdraw?

THE DEFENDANT: I certainly do, your Honor.

THE COURT: And what is our recollection?

THE DEFENDANT: Because there was no extension. He said if you don't get an extension and allow us more time to go through this discovery I'm going to withdraw.

THE COURT: He said he could not prepare for trial in the time.

THE DEFENDANT: That's correct. And our Honor then granted both the extension and the withdrawal motion, and it still puzzles me. But I would restate, your Honor, that I'm being deprived of my Sixth Amendment right to the co-counsel of my choice.

APPENDIX "D"

TRANSCRIPT OF THE 08/02/2004 PROCEEDING

Petitioner's Good Faith Belief

TRIAL TRANSCRIPT

Testimonial Evidence of Good Faith

[THE DEFENDANT] I believe when a jury sees this whole thing and hears my cross examination of their very witnesses and sees the material and see the evidence and sees and hears what was done in this business, that I will be acquitted.

Q. Please?

A. "The purpose of this letter is to verify in writing the substance of our telephone conversations concerning the terms of your employment with Louis Allen and Company. Our position concerning our employees and homeworker trainees is simple and clear. You are hereby authorized to do anything and everything necessary to assure fair and equitable treatment of our employees and homeworker trainees. To repeat, anything and everything," capitalized and underlined.

"If there was a simpler, clearer way to state this, I would use it. You are authorized to do whatever it takes to help our homeworker trainees complete their Training and Aftercare preparation program and begin working.

"You are further authorized to do whatever it takes to make sure that once they begin working, they make the guaranteed weekly income at the income level they have selected.

"Additionally, you are authorized and expected to pay all bonuses earned and reimbursed, all legitimate expenses according to the terms of the employment.

"Let me also clearly state that all legitimate, documented disputes are to be settled in favor of the employee and/or homeworker trainee.

"Our company policy is simple and clear. Do whatever it takes, spend whatever is necessary to assure their successful training and employment.

"We are glad to have you with us. Keep up the fine work.

"Your friend, Louis Allen, president.

"P.S. The enclosed packet is to be given to any legitimate investigating governmental agency. You are not authorized to enter into any verbal communications with anyone regarding our business operation, because we have been instructed by our legal counsel to maintain a full and complete written record of any and all communications between our company and any investigating governmental agency and that all communications must be through our legal department. You are to simply had them the packet, read them this portion of the letter you are holding and end the encounter."

Q. Would that be a fair summary of how I told you to run the business, your portion of it?

A. Probably.

Q. Did you do that?

A. Did I give this letter to them?

Q. No, no. Did you do what I asked you to do in the letter?

A. I think I worked very hard at the job that I was given.

Q. I do too.

Q. Exhibit 433. Have you seen these figures before?

A. Yes.

Q. What do they represent?

A. Basically tells how many applications were received for the

months of April, May and June; how much total money cam in, how much of it was Mr. Allen's, how much of it was mine; the amount paid out in bonus and reimbursements, and then they amounts that were paid out to the three people who were working for us.

Q. Did this reflect the change in activity after the search warrant

was served on Teresa Patton in Akron, Alabama?

A. Yes.

Q. Does this reflect the mail that was then forwarded to you?

A. Yes.

Q. Can you tell us, for that three-month period of time that is reflected, how many applications came to your center?

A. 17,890.

Q. How much money came in?

A. A total of $225,387.25.

Q. Of that amount, how much went to Mr. Allen?

A. $133,572.50, less half of the bonus and reimbursements.

Q. How much went to you?

A. $90,250, less the bonus and reimbursements.

Q. The bonuses paid out?

A. Paid out a total of $25,563.36.

Q. The reimbursements?

A. $9,127.50.

Q. Who is Peggy?

A. She worked the help line.

Q. Was that Peggy Shields?

A. Yes.

Q. How much did you pay her?

A. $474.

Q. Who is Angie?

A. She also worked the help line, Angela Anderson.

Q. How much did you pay her?

A. $1,976.36

Q. Who is Valerie?

A. Valerie, I believe she was Teresa's granddaughter or niece.

She did the refunds.

Q. How much did you pay her?

A. $2,855.99.

Q. Ms. Briscoe, did there come a time – let me back up. When

you were a homeworker, how many applications did you process?

A. Probably about a thousand.

Q. AT $25 each?

A. Yes.

Q. Now, then, during the period of time that you were in business, running ads, did anyone ever show up wanting their envelopes?

A. One person.

Q. Can you tell us approximately when that was?

A. A day or two before the postal inspector cam to my home, so around June 20th, 23rd.

Q. Tell us the circumstances.

A. I don't remember his name. He drove from – I'm not even

sure I remember the state; Ohio, I think. And he went to the address of my Mail Boxes Etc. They wouldn't give him my

home address, so they called me from there. He said that he was just wanting to speak with me. He didn't really specify why, and it kind of freaked me out a little bit.

So I told him that I couldn't come down there and meet with him, but I was very open to speaking with him, and if he wanted to talk to me, he just needed to call me. But I didn't feel comfortable with going down there and meeting with him.

Q. Did you talk to him on the phone?

A. No, I never heard from him again, because the postal inspector came shortly after.

Q. Why was he here?

A. He didn't really specify. He said he just wanted more information, wanted to know about where his envelopes were. That was pretty much it.

MR. ROBINSON: That's all, Your Honor.

THE COURT: Cross-examination, Mr. Chavis

CROSS EXAMINATION

BY MR. CHAVIS:

Q. Tammy.

Okay, you worked, you started out as a homeworker?

A. Yes.

Q. And you worked between – you said between nine months

and a year, and you worked your way up; you called the homeworker hot line, help line, somebody called you back, everything went well?

A. Yes, sir.

Q. You believed in the program, I assume, did you not?

A. Yes.

Q. You stated that the company, me, John and I, made all the refunds; is that correct?

A. Yes.

Q. And that you became a center in February of '03 and started

out with 100 to 200 pieces of mail a week. The next big change in that would have occurred, I suppose, would it not, right after the April raid on the Alabama –

A. Correct.

Q. Did you still believe in the program?

A. Yes.

Q. Then for the months of April and May and most of June, you

took on the refunds and the Better Business Bureau inquiries and complaints and the attorney general inquiries and complaints, and that swelled the volume considerably?

A. Yes.

Q. Approximately how many of those complaints did you

handle on a weekly or daily, or however you remember, basis?

A. Which ones, refunds, or just complaints from Better Business Bureau?

Q. Just – even inquiries – well, complaints.

A. Complaints from Better Business Bureaus, or D.A.'s or whoever, I probably sent out 30 to 50 letters a week addressing inquiries that had come from that.

Q. And you had 400 active homeworkers transferred from Alabama?

A. Correct.

Q. From previous testimony, from the postal inspector, we know that there were 700 active homeworkers at the time they shut it down, so you lost 300. Was there any conversation with Teresa about that?

A. No, we just assumed that was going to happen. I mean with

all of the lost paperwork, we figured a lot of the people would drop off.

Q. Because they took all the paperwork, all the money out of the bank, everything.

A. Right

Q. From Alabama.

Government's Exhibit 401, you manned or you oversaw, I suppose we should say, the homeworker help line, hot line?

A. Yes.

Q. And these were frequently-asked questions?

A. Uh-huh.

Q. Frequent concerns?

A. Yes.

Q. To the best of your knowledge, was every response being handled, was every call returned?

A. Yes.

Q. 403. This was a response when someone requested a refund?

A. Correct.

Q. This came out of the Akron, Alabama office, so this must have been before April?

A. Right.

Q. Were you using pretty much the same material after April, when it was moved to Cottondale, --

A. Yes.

Q. – or do you recall?

A. Yes, yes.

Q. Now, you had mentioned – I recall some conversation about

this – you said that I had told you not to make over $3,000 worth of refunds a week?

A. You preferred to keep it at $3,000 a week.

Q. Yeah, I was trying to limit it to $3,000 a week.

A. Right

Q. But did you understand that to mean that I was telling you to refuse refunds?

A. No.

Q. Just carry them over to the next week?

A. Right.

Q. Yeah, okay. I just wanted to be sure. You didn't ever refuse anyone a refund, did you?

A. No.

Q. Did you ever refuse anyone a bonus check or a reimbursement check or any kind of remuneration?

A. No.

Q. No. 405. I should get you to read that, since it's not up on the screen, but it's – I'll just critique it. "Recently we received correspondence asking if any other positions were" --

MR. ROBINSON: Tour honor, I don't believe it's proper for Mr. Chavis to read this, he should be asking questions.

Q. (By Mr. Chavis) Would you just read the first part –

THE COURT: Sustained, sustained.

MR. CHAVIS: Sorry, Your Honor.

A. Yes.

Q. Thank you.

And 422, please.

One further question regarding that formula. You wrote a lot of bonus checks and a lot of reimbursement checks?

A. Yes, I did.

Q. Were the active homeworkers who pursued this program making money?

A. Yes.

Q. My question on Government's Exhibit 422 – and I would ask you to identify it for the jury, if you'd read that first paragraph.

A. "Dear Homeworker, as I started in an earlier letter that I hope you all received, we are under new management. We anticipate that the changes made in our program will be beneficial to you. Due to the changes in our management and other departments, we are merging our two centers in Oklahoma, which will have a new name and address. The new address is – "

Q. That's good. What was the date that this was – that you began using this, do you recall?

A. I never actually got to use it. I had all the packets made up,

but the postal inspector came to my house before I was able to get them in the mail.

Q. Thank you.

Tammy, when is the last time that you and I spoke on the

circumstances, intentionally set out to defraud anybody?

A. No.

Q. Thank you.

Did I ever give you any instructions as to what to do if a homeworker ever asked you – or ever told you that they didn't have the money for advertising or any start-up costs?

A. Yes, you said for me to provide it for them.

Q. That the company would prepare all of their costs?

A. Correct.

Q. Did you ever do that?

A. I think I paid for advertising for a few people and paid for some rubber stamps.

Q. Thank you.

Did you receive a copy of what we called "the packet" that you were to give any postal inspector?

A. Yes, I did.

MR. CHAVIS: Your Honor, I have some material from that packet I'd like for her to read. I believe it's been entered into exhibits already.

THE COURT: It's admitted into evidence? If you could just identify it, Mr. Chavis, for the record.

MR. CHAVIS: These are the testimonial letters. There are 12 of them.

THE COURT: Have they been admitted into evidence by a number?

MR. CHAVIS: I believe they've been admitted by the Government.

THE COURT: Is that correct, Mr. Robinson?

MR. ROBINSON: If they're in the packet, they have been admitted, Your Honor, but I don't know which bones he's talking about.

THE COURT: Why don't we number them, the 12 that he has, 12-A, 12-B, 12-C, like that, for the record.

Do you have exhibit stickers on these ?

MR. CHAVIS: I have them on the front.

I move to enter these as exhibits.

THE COURT: Is there any objection? I understand there may be a duplicate between the Government's exhibit, which may have been a volume exhibit. Any objection to the admission of n12 – what are your numbers, 12-A through – A through L?

MR. CHAVIS: I numbered them K-1, 2, 3.

THE COURT: Okay. It is K what?

MR. CHAVIS: I think it's 14.

THE COURT: K-1 through 14. Any objection?

MR. ROBINSON: Yes ma'am. I do not believe – if we are talking about Exhibit 25, the packet, I do not believe that all of these went n with this packet. If they didn't go in, I object on the grounds of foundation and hearsay.

MR. CHAVIS: They were given to me by the Government.

THE COURT: I understand. I'll overrule the objection. I will admit Defendant's Exhibits K-1 through K-14.

Q. (By Mr. Chavis) I would like to ask you to read those, please.

A. The first page days, "Dear Mr. Chavis, pursuant to the Court's order"--

Q. Well, let's just – you don't have to read that.

A. Okay.

"September 19, 2002.

"Dear sir, I am sending in a total of 31 orders this week. This gives me a total of 54 orders sent to you since my business began. This entitles me to my first reimbursement check of

$107.50, in addiction to a bonus check of $50 for sending in over 25 orders this week. Thank you for this opportunity. It does take advertising and a little work, but it is giving me a nice second job."

"Sincerely, Brett Roberts."

This one's kind of smeared a little bit. "To whom it may concern –"

THE COURT: She needs to identify – Mr. Chavis, we need to have them identified by the –

THE WITNESS: Number?

THE COURT: Yes, please.

THE WITNESS: Okay. This is K-3.

A. "To whom it may concern: In response to your recent communication regarding my business activities, I would like to request a written description of how my company is on violation of mail fraud statues. Please be specific, so that I can address all issues.

"Let me state emphatically that this program works. It is honest and fair. It lives up to every claim, fulfills every promise, makes every bonus payment and reimbursement, every authorized legitimate expense. I have tried other programs of only honest and fair, but not effective. I am making the money promised, and so are the people I am hiring for other companies.

"Please put any and all concerns, questions, and/or

objections in writing, clearly stated, and we will address them. We will make any reasonable and appropriate changes requested in out materials. We will answer any and all questions raised. We will address any and all concerns you may have. All we ask is that everything be clearly stated in writing. Our response will be the same, giving each of us a clear, written record of all communications between us.

"Awaiting your reply, I remain willing and eager to cooperate with your agency's investigation in any and every way possible.

"Sincerely, Jackie Earls."

This is K-4, dated September 12, 2002, Debra Valdez.

I give my word as much and as hard for your company. Thank you for giving me this chance.

"Tomeka Murphy."

This is K-6.

"To whom is may concern: My name is Tammy Briscoe. I have been working with the envelope stuffers for a little over four months now. When I first began doing this, I was not really expecting much, but thought that I would try it for a little while before giving up on it. Much to my surprise, it has really worked out for me. The company has fulfilled everything that they said they would do as far as bonus checks and reimbursement checks. They have also been very supportive if I have any questions or

problems, and it is nice to be able to actually speak with someone.

"My first week at this was a little rocky, but I have been making over $2,000 a month, plus bonuses now, for almost three months, and that is more than I expected when I started. I feel fortunate to have been given the opportunity for this position, and plan to continue doing this for a while. It is because of the extra income from envelope stuffers that I am able to continue staying at home with my son. I have been very impressed with this company, and hope that my work for the company will be satisfactory as well.

"Thank you for this opportunity. Tammy Briscoe."

Q. I want to interrupt just for a second. That letter is from you.

Did you write it yourself?

A. Yes.

Q. Is it true?

A. Yes.

Q. Did I ask you for that letter?

A. Teresa asked me to write a testimonial.

Q. Thank you.

A. Continue?

Q. Please.

A. This is K-7, it's dated November 10, 2002. And it's got a

header of "A. Earls" on it.

"To whom is may concern: The first of this year I retired from a full-time job after 32 years. For the past seven of those years, I held down a part-time job. I never had time for my family or myself. Once retired, my income decreased by half, so I began searching for a work-at-home job. I found your company, sent in my application and $24 deposit, and have not regretted my decision.

"After following the instructions and all the directions that were asked of me, this job has worked out quite well. The income I receive helps pay my bills and lets me achieve my goals. Your company has fulfilled all of the promises that were made to me. Like it says, if I do my part, they will do theirs.

"I have been working for your company for over six months now and have never looked back. I want to thank you for giving me this opportunity to better my way fo life. I also want to thank my supervisor and her staff for being there. She has given her undivided support to me and to all of her active homeworkers. She is greatly appreciated.

"Sincerely, A. Earls."

This is K-8.

MR. ROBINSON: Excuse me, Your Honor. The Government would stipulate

that the rest of the exhibits, the same tenor is conveyed in most of them.

THE COURT: Do you accept the stipulation?

MR. CHAVIS: I want them read, Your Honor.

THE COURT:

Very well.

A. This is K-8.

"I would like to thank you for the opportunity to have my own business. It's been blessing for us.

"Reggie an Carolyn."

This is K-9, it's dated 9/26/02.

"To whom is may concern: Thank you for your support and job offer and letting me see how you work. I found a job at home that I trust. I had 50 responses in the first week, and now I have been waiting for a deposit/application to come back, but getting more everyday.

"Thanks again. I have time with my children and husband. They love it, too.

"A. Bush."

This is K-10. And it says:

"Teresa, thank you very, very much for your kind help

(financial). The month's ad in the OK Gazette and the check are truly appreciated. I could not have gone on without that help. I promise I will come through for you, and I promise this –" I can't read that word – something – "check enclosed is good/not rubber.

"Sincerely, Sid Omar."

This is K-11, and it's dated March 8, 2003.

"To whom it may concern: I have been with this company since September 2002. This kind of home employment lets me work at my own pace and choose the hours. Everyone I have dealt with has been very helpful in answering my questions I had. And so far, the company has done everything they said they would. My bonus checks are always correct, and I average between $300n and $500 a week. I fully expect to be earning more very soon.

"Mary. Kentucky."

And below that, it says, "You have my permission yo use this letter anyway you choose."

K-12 is the same letter.

Q. (By Mr. Chavis) Sorry?

A. It's the same letter. Do you want me to read it again?

Q. No, no. I'm sorry.

A. K-13 is dated March 10, 2003.

"To whom it may concern: I have been stuffing envelopes for a few months with this company and have received all money

ad bonus that is promised. I work from home, which has enabled me to help care for my 100-year-old grandmother and my child. I work a few hours a day and usually make about $500 a week after expenses.

"The training was simple and helped me get set up for working at home. I receive envelopes and stamps, as well it I have any questions, there is a phone number I can call and have someone return my call in person. I have to turn in weekly reports. I never have to worry about refunds. I just send it to me. I am very happy with working with this company.

"Rosanna. Missouri."

Q. Can I stop you just a minute?

A. Uh-huh.

Q. She made reference to receiving stamps. Did you regularly send out stamps to those homeworkers who requested or needed them?

A. If they requested them, yes.

Q. Free stamps?

A. Yes.

Q. Thank you. Go ahead.

A. And K-14 is also the same letter.

APPENDIX "E"

TRANSCRIPT OF THE 08/02/2004 PROCEEDING

Statement Of Need For Co-Counsel

THE DEFENDANT: I go a co-counsel because I thought

I needed one. A friend helped me with that. We have paid this man and now you are just letting him go and are going to continue the trial again, Your Honor.

APPENDIX "F"

TRANSCRIPT OF THE 08/02/2004 PROCEEDING

No Consent To Stand By Counsel

By way of a brief history, the Court had appointed a stand-by counsel for Mr. Chavis, who Mr. Chavis later indicated to the Court he did not want / need ....

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What the Court is going to do – I have asked Ms. Tyhurst to be here. I know that you, Mr. Chavis, did not ask this Court for stand-by counsel. The Court gave you its spiel the last time about how important it believes it is to have some level of advise, especially in a criminal matter. The Court appointed stand-by counsel.

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THE COURT: Very well. I'm going to allow Mr. – I'm going to permit - over your objection, Mr. Chavis, I'm going to permit Mr. Cantrell to withdraw as co-counsel, and I'm going to simultaneously reappoint Mr. Tyhurst as stand by counsel.

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[THE COURT] Certainly there is some evidence that the Defendant personally believed that his allegedly unlawful conduct was in fact lawful. None of the cases give this Court any guidance on the reasonableness of that under the facts and circumstances.

But the Court will rule that you are not entitled to this good-faith defense, because there is really insufficient evidence in this record to support that defense. That will be the ruling of the Court. Your objection is certainly noted, your exception to the Court's ruling is noted for the record.

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